United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-1242

To be argued by
SHEILA GINSBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

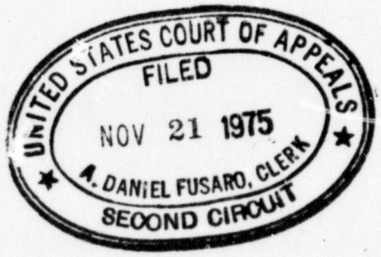
RAYMOND RICKMAN and
RICHARD SMITH,

Appellants.

Docket No. 75-1242

REPLY BRIEF FOR APPELLANT
RAYMOND RICKMAN

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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The Government argues (Br. at 15-18) that appellant's decision to answer some of the questions put to him in a custodial interrogation constituted a waiver of the Fifth Amendment privilege to refuse to answer other questions asked in the interrogation and to refuse to sign a form. This argument is without merit.

1. The Government's waiver argument was anticipated and rejected by the Supreme Court in Miranda v. Arizona,

384 U.S. 436, 476-476 (1966):

> ... [W]here in-custody interrogation is involved, there is no room for the contention that the privilege is waived if the individual answers some questions or gives some information on his own prior to invoking his right to remain silent when interrogated.

Most recently, in Rose v. United States, 43 U.S.L.W. 3674 (June 24, 1975), where the defendant had selectively asserted his Fifth Amendment privilege during a custodial interrogation, the Supreme Court nonetheless remanded to this Court for reconsideration in light of United States v. Hale, 95 S.Ct. 2133 (1975).*

Moreover, a fact conveniently ignored by the Government is that appellant had been specifically informed by investigators, as part of the Miranda warnings, that should he decide to cooperate, he was nonetheless free to stop answering questions at any time.** In this context, the Government is stopped from asserting waiver.***

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*Rose v. United States (Docket No. 73-2760) is currently sub judice before another panel of this Court.

**See the substance of the warnings given in this case, set forth in the transcript of the suppression hearing dated May 5, 1975, at page A.50.

***See appellant's main brief at 16-18 for a discussion of the absence of probative significance of silence in light of these warnings. See also United States v. Hale, 95 S.Ct. 2133 (1975).

2. Disingenuous, at best, is the Government's contention that appellant's refusal to sign the receipt for his $762 was not incriminating. The Supreme Court, in Miranda v. Arizona, supra, 384 U.S. at 477, explicitly rejected any distinction between "inculpatory" and so-called "exculpatory" statements. The logic of this is obviously that the prosecution will introduce into evidence only that material which will incriminate a defendant. Here, introduction of appellant's refusal to sign the receipt was dramatically inculpating. The Government's brief notwithstanding, the prosecutor introduced evidence of appellant's refusal to cooperate to establish that he had stolen the money from the bank. The prosecutor explicitly told the jurors that appellant's refusal to sign the receipt was "proof of how dirty this money was"!

The Government also asserts that the introduction of evidence of appellant's silence when he was asked by the agent how he knew what time the bank was robbed was not incriminating. This is patently erroneous. In summation, the prosecutor chose to use appellant's decision not to answer this question as direct proof that appellant participated in the robbery (see appellant's main brief at 10-11).

3. In addition, the Government's waiver argument fails to perceive that there is a fundamental distinction between an accused's counseled decision to testify at trial and his lone, custodial acquiescence to the interrogation by inves-

tigators.* The Government's reference to Brown v. United States, 356 U.S. 148 (1957), and Fitzpatrick v. United States, 178 U.S. 301 (1899), both cases in which the defendant testified at trial, shows this error by the Government. These cases do not apply to custodial interrogation. The Supreme Court, in United States v. Hale, supra, adopted this distinction.

The rationale of cases like Brown v. United States, supra, 356 U.S. at 155, and Fitzpatrick v. United States, supra, 178 U.S. at 315, is that a witness who voluntarily presents his version of the facts by testifying before the jury cannot insulate that testimony from scrutiny by refusing to answer relevant questions on cross-examination. None of those concerns are present in this case. If the Government had not offered the statements, they would have remained hearsay, outside the knowledge of the jury. It is a high form of distorted logic, indeed, for the Government to argue that, because the prosecution introduced appellant's pretrial statements in its direct case, appellant is therefore not entitled to exclude from evidence before the jury his selective invocation of the Fifth Amendment privilege.

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*This waiver argument followed to its logical -- or illogical -- conclusion, would mean, Griffin v. California, 380 U.S. 609 (1965), notwithstanding, that once an accused had spoken to investigators he would then not be free to remain silent at trial without the prosecutor's commenting on his failure to testify.

4. It is this same obfuscation of the facts which inspires the argument that the evidence here was so overwhelming that the error here was harmless (Government Br. at 10-15).

The jury deliberated for seven hours in a case where the only question was one of identity. The evidence was neither overwhelming nor uncontradicted (see Appellant's main brief at 3-5 and 14-15). During deliberations, the jury requested that Wayne Butler's testiomny be reread.*

In this context, the Government's improper use of appellant's reliance on his Fifth Amendment privilege unquestionably had an impact on the verdict. Consequently, this Court cannot conclude that the errors were harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24 (1967).

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*Butler's eyewitness identification of appellant conflicts with other concrete evidence in the case. For example, regarding the challenge to Butler's testimony that appellant was the robber carrying a rifle -- the bank guard said it was Smith -- the Government contends that Smith "obviously" gave the rifle to appellant before leaving the bank. The record is devoid of evidence that the robbers, in the midst of their hurried flight from the bank, stopped in the bank's vestibule so that Smith could give appellant the gun. The prosecutor's resort to this theory as fact at trial prompted defense counsel to move for a mistrial.

Similarly, the Government's explanation as to how appellant's fingerprints got to the back seat of his friend's Oldsmobile (Br. at 4) finds no support in the evidence presented at trial. There was no proof at trial that any of the robbers got into the rear seat of the Oldsmobile. Moreover, if Butler's testimony is to be credited, he saw appellant get into the front seat of the Ford getaway car (162), and it was this robber, according to Anthony Webb, who got into the front of the Oldsmobile (244).

5. Contrary to the Government's analysis, defense counsel did not have to object to preserve this issue for appeal. In United States v. Indiviglio, 352 F.2d 276, 280 (2d Cir. 1965), cert. denied, 383 U.S. 907 (1966), this Court explained that the reason for requiring objection was to give the trial judge an opportunity to correct the error. In this case, Judge Weinstein immediately recognized the error and tried by cautionary instruction to correct it. Defense counsel's objection would have served no purpose but to focus the jurors' attention further on the inadmissible evidence.

That the error was not remedied below is due not to defense counsel's failure to object, but rather to the seriousness of the error which was compounded by the prosecutor's conduct in repeatedly inferring guilt from the evidence of appellant's exercise of the Fifth Amendment privilege. The Government's contention on appeal (Br. at 9) that the prosecutor was not aware before his summation that Judge Weinstein had ruled such evidence inadmissible ignores proof to the contrary in the record. During the trial, and well before the summation, the trial judge specifically told the prosecutor* that similar evidence, this time of appellant's refusal to tell the agents where he lived, was not

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*This occurred outside the hearing of the jury and on defense counsel's objection to the evidence.

to come into evidence (313-315). The assertion in the Government's brief that the prosecutor did not understand that admission of this type of evidence was error simply defies all credibility.

CONCLUSION

For the above-stated reasons and the reasons set forth in appellant's main brief, the judgment of conviction must be reversed and the case remanded to the District Court for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

November 21, 1975

I certify that a copy of this reply brief for appellant Raymond Rickman has been ~~mailed~~ delivered by hand to the United States Attorney for the Eastern District of New York.

Sheila Gunsberg